



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9785-2]

[EPA-R01-OEP-FRL#: 13-007]

State Program Requirements; Approval of Maine's National Pollutant Discharge Elimination System (NPDES) Permitting Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice. Proposal to Approve Maine's National Pollutant Discharge Elimination System (NPDES) Permitting Program.

SUMMARY: In 1999 the State of Maine applied to implement its NPDES program under the Clean Water Act in the state, including the territories of the Aroostook Band of Micmacs and the Houlton Band of Maliseet Indians. Today, EPA is proposing to act on the state's application as it applies in those Indian territories and is inviting comment.

DATES: Interested persons may submit comments on the approval of Maine's NPDES Permitting Program in these territories as part of the administrative record to EPA—Region 1, at the address given below, no later than midnight through [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit comments by one of the following methods:

- E-mail: velez.glenda@epa.gov
- Mail: Glenda Vélez, USEPA-Region 1, 5 Post Office Square – OEP06-01, Boston, MA 02109-3912
- No facsimiles (faxes) will be accepted.

FOR FURTHER INFORMATION: Additional information concerning the proposed approval of Maine's program in these territories may be obtained between the hours of 9 a.m. and 5 p.m. Monday through Friday excluding holidays from:

Glenda Vélez

USEPA-Region 1

5 Post Office Square – OEP06-01

Boston, MA 02109-3912

Telephone: 617-918-1677

Email: velez.glenda@epa.gov

SUPPLEMENTARY INFORMATION:

2001 Approval of Maine's Base NPDES Permitting Program

On December 17, 1999, EPA determined that the State of Maine had submitted a complete application to administer the National Pollutant Discharge Elimination System (NPDES) permitting program in the state under the Clean Water Act (CWA). 33 U.S.C. § 1251, *et seq.*, see 64 FR 73552 (Dec. 30, 1999). Maine's application included an assertion of authority to implement the program in the territories of the federally-recognized Indian tribes within the state, based on the jurisdictional provisions of the Maine Indian Claims Settlement Act (MICSA), which ratified the Maine Implementing Act (MIA). 25 U.S.C. § 1721, *et seq.* and 30 M.R.S.A. § 6201, *et seq.*, respectively.

On January 12, 2001, EPA approved the State of Maine's application to administer the NPDES program for all areas of the state other than Indian country. At that point EPA did not take any action on Maine's application to administer the program within the territories of the federally-recognized Indian tribes in Maine. EPA published

notice of its action on February 28, 2001. 56 FR 12791. As described in the Federal Register, EPA approved the state's application to administer both the NPDES permit program covering point source dischargers and the pretreatment program covering industrial dischargers into publicly owned treatment works (POTWs). EPA did not authorize the state to regulate cooling water intake structures under CWA section 316(b) (33 U.S.C. § 1326(b)). 56 FR at 12792.

2003 Partial Approval of Maine's Program in Indian Territories

On October 31, 2003, EPA approved the State of Maine's application to administer the NPDES program in the Indian territories of the Penobscot Indian Nation and the Passamaquoddy Tribe, with the exception of any discharges that qualified as "internal tribal matters" under MICSA and MIA. 68 FR 65052 (Nov. 18, 2003). This action generally authorized the state to administer the NPDES program in the territories of the two largest Indian tribes in the state, finding that the combination of MICSA and MIA created a unique jurisdictional arrangement that granted the state authority to issue permits to dischargers. EPA did not approve the state's program to regulate two small tribally-owned and operated POTWs. EPA determined that permitting these POTWs qualified as an internal tribal matter and, therefore, fell within an enumerated exception to the grant of jurisdiction to the state in MICSA and MIA. EPA also did not take action on the state's application as it applied to the territories of the two other federally-recognized tribes in the state, the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs. These two tribes are subject to jurisdictional provisions different from those that apply to the Penobscot and Passamaquoddy tribes.

2012 Approval of Maine's Program as to Penobscot and Passamaquoddy Tribal

Discharges

On March 26, 2012, EPA approved Maine's NPDES program to apply to tribally owned and operated discharges in the territories of the Penobscot Nation and Passamaquoddy Tribe (the "southern tribes"), pursuant to the decision of the Federal Court of Appeals for the First Circuit. 77 FR 23481 (April 19, 2012). The court had found that such discharges did not qualify as internal tribal matters and were, therefore, subject to the laws of the state. *Maine v. Johnson*. 498 F.3d 37 (1st Cir. 2007). As a result, EPA approved the state to implement its program in the territories of the southern tribes without exception. Accordingly, the state assumed responsibility from EPA for issuing and administering the two permits EPA had previously withheld for the Penobscot Nation Indian Island treatment works (EPA NPDES Permit No. ME 0101311 and MEPDES License No. 2672) and the Passamaquoddy Tribal Council treatment works (EPA NPDES Permit No. 1011773 and MEPDES License No. 2561). In that action the EPA only approved the state's program with respect to the two permits for the two tribal treatment works. EPA did not take action on Maine's program application with respect to the Aroostook Band of Micmacs and Houlton Band of Maliseet Indians (the "northern tribes").

Intervening Legal Developments

In the process leading up to EPA's 2003 partial approval of the state's program in Indian country, EPA had invited comment on the state's jurisdiction under MICSA to implement its program in the territories of all the Indian tribes in Maine, including the northern tribes. Since EPA's initial decision to defer action on the state's application as it

applies to the northern tribes, the Federal Court of Appeals for the First Circuit has issued several opinions which clarify the operation of MICSAs' jurisdictional provisions as they apply to those tribes. Therefore, EPA is again inviting comment on Maine's application to administer its program in the northern tribes' territories so that interested parties can address those opinions and any other aspects of Maine's NPDES program relevant to authorizing the state's NPDES program in these tribes' territories. In this way, EPA can respond to comments that more accurately reflect the current state of the law and program implementation, rather than comments from 2000 and 2001.

In brief, there are three decisions from the First Circuit that EPA expects will guide the Agency's analysis of the jurisdictional issues in acting on Maine's application as it applies to the northern tribes. The first is *Maine v. Johnson*. 498 F.3d 37. As described above, the court held that MICSAs' "internal tribal matters" exception to the state's jurisdiction over the southern tribes did not include discharges of pollutants into navigable waters to be permitted under Maine's program. *Id.* at 46. Therefore, Maine's state permitting program applies without exception in the territories of the southern tribes, and the state has jurisdiction sufficient for EPA to approve the state's program under the federal Clean Water Act.

Second, in *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41 (2007) the court held that MICSAs made the Aroostook Band subject to the state's jurisdiction without the exception for "internal tribal matters" that is available to the southern tribes. *Id.* at 50. Third, in *Houlton Band of Maliseet Indians v. Ryan* the court extended this analysis to the Maliseet tribe. 484 F.3d 73, 74-75 (1st Cir. 2007). In both these cases, each tribe sought to block enforcement of Maine's antidiscrimination laws in connection with the tribes'

decision to terminate the employment of certain tribal government employees. The court held that the tribes were subject to state regulation when making such employment decisions.

Proposed Action on Maine's Program

Employment decisions by tribal governments qualify as an internal tribal matter with respect to the southern tribes and, therefore, are beyond the reach of state regulation under MICA. *Penobscot Nation v. Fellenner*, 164 F.3d 706 (1st Cir. 1999). In its pair of decisions in 2007, the First Circuit clarified that the scope of Maine's jurisdictional authority over the northern tribes reaches further than the state's authority over the southern tribes, and the state can regulate matters of the northern tribes that would qualify as internal tribal matters of the southern tribes. The First Circuit has ruled that the state has adequate authority to implement its NPDES program in the territories of the southern tribes, even in the face of the internal tribal matters exception the southern tribes have from state regulation. It appears to follow, therefore, that Maine has an even stronger claim of authority to implement its NPDES program in the territories of the northern tribes.

Accordingly, EPA proposes to approve the state to implement its NPDES program in the territories of the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs, provided Maine submits and EPA approves a program addressing the requirements of CWA section 316(b) as described below. EPA invites comment on both the determination of the state's jurisdiction to implement the program in these tribes' territories and the respective roles of the state, tribes, and EPA in the context of a state

implementing the NPDES program in the territories of federally recognized tribes in Maine.¹

¹ Neither tribe has applied to EPA to implement the NPDES permit program, so this proposed action does not invite comment on the question of whether either tribe has authority to implement the program.

Note that in 2001 when EPA first approved the state's program, Maine did not have authority to regulate cooling water intake structures under CWA section 316(b). The state has since granted Maine DEP that authority, and EPA is working with DEP to develop the state regulations necessary for Maine to implement that program. Once Maine submits that program, EPA will publish a separate notice inviting comment on the adequacy of Maine's section 316(b) program before taking final action to approve the state's NPDES program, including the section 316(b) program, in these territories. The Agency is inviting comment now on the balance of the state's permitting program and the jurisdictional issue.

Authority: This action is proposed to be taken under the authority of Section 402 of the Clean Water Act as amended, 42 U.S.C. 1342.

Dated: January 31, 2013. H. Curtis Spalding, Regional Administrator, Region 1.

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